

In re) Fair Hearing No. 11,070
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Appeal of)

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

The petitioner is a fifty-four-year-old man with a high school education. He has worked mostly as a self-employed drywall installer.

The petitioner has a history of bladder cancer with several operations in the 1980's, the most recent being in 1989. It appears, however, that after each surgery the petitioner was able to resume working.

For the last few years, the petitioner has also been experiencing increasing pain in his right shoulder. This finally caused him to stop working in early November, 1991. In December, 1991, an orthopedist diagnosed the problem as a rotator cuff tear and advised the petitioner that surgery would probably be necessary.

In January, 1992, the petitioner underwent a consultative examination. In a report of that examination

the consulting physician related the following "impression" of the petitioner:

It should be noted he can only lift his right arm abducting from the side to about 45 and then he is completely limited and has weakness) he can extend frontward in a sagittal plane over his head to some extent with his right arm. He should have an orthopedic evaluation and surgery on his right rotator cuff tear which is rather obvious. He should have his dental hygiene looked into and probably receive plates. He should have orthopedic evaluation of the left lower leg and toe to see if this is circulatory or neurological, it doesn't seem to fit any neurological pattern at this time and if surgery is required there it should be done. At this time, this patient is disabled and should do no kind of work.

In light of the above, there is no question that the petitioner is disabled at this time. Moreover, a preponderance of evidence establishes that even with surgery the petitioner will not regain ability to perform frequent "medium" lifting (twenty-five to fifty pounds) within a years time.

ORDER

The Department's decision is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work

experience is considered.

In this case the medical evidence is clear that the petitioner has been unable to perform any work since November, 1991. Under the regulations, as of August, 1992 (when he turns fifty-five) the petitioner would be found disabled unless he regains the ability to perform "medium work", which entails frequent lifting of up to twenty-five pounds and occasional lifting of up to fifty pounds. See 20 C.F.R. §416.967(c) and 20 C.F.R. § 404, Subpart P., Appendix II, Rules No. 202.06 and 203.15. Based on the unequivocal opinion of the Department's consulting physician, the petitioner's history of bladder cancer, and the evidence of additional problems in the petitioner's lower left leg, it is concluded that the petitioner will not, within a year, even with surgery on his shoulder, regain this capacity to perform "medium work". As noted above, this is sufficient to establish disability under the regulations. The Department's decision is, therefore, reversed.

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